

***United States Court of Appeals
for the Second Circuit***



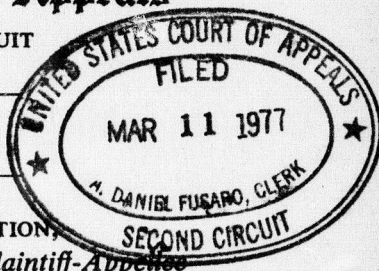
**BRIEF FOR
APPELLANT**

77-7100

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-7100



DRYS SHIPPING CORPORATION,

Plaintiff-Appellee

against

FREIGHTS, SUB-FREIGHTS, CHARTER
HIRE AND/OR SUB-CHARTER HIRE OF
THE M.S. DRYs,

and

A/S FALKEFJELL AND A/S DOVREFJELL,
Defendants-Appellants,

and

ATLANTIC AND GREAT LAKES STEAMSHIP
CORPORATION,

Garnishee-Appellee.

APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

**BRIEF OF DEFENDANTS-APPELLANTS
A/S FALKEFJELL AND A/S DOVREFJELL**

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APPEAL FROM UNITED STATES DISTRICT COURT,
SOUTHERN DISTRICT OF NEW YORK

**BRIEF ON BEHALF OF DEFENDANTS-APPELLANTS,
A/S FALKEFJELL AND A/S DOVREFJELL**

STATEMENT OF THE CASE

Defendants, A/S Falkefjell and A/S Dovrefjell appeal from an order of the United States District Court for the Southern District of New York which denied defendants' motion to vacate the Process of Maritime Attachment and Garnishment and Warrant for Arrest in Action *In Rem* which plaintiff obtained, denied defendants' motion to dismiss the complaint and denied defen-

dants' request for an order restraining plaintiff from further attempting to exercise liens pursuant to the charter party for claims subject to London arbitration.

ISSUE PRESENTED FOR REVIEW

The question presented by this appeal is whether the provisions of Title 9, U.S.C., the Arbitration Act, or the law as set forth in recent Supreme Court decisions invalidate the Process of Maritime Attachment and Garnishment and Warrant for Arrest in Action *In Rem* obtained by Drys Shipping Corporation as security for arbitration proceedings that have already commenced in London.

STATEMENT OF FACTS

Drys Shipping Corporation (plaintiff-appellee), the Owners of the M.S. Drys, chartered to A/S Falkefjell and A/S Dovrefjell (defendants-appellants), brought suit in the United States District Court for the Southern District of New York, alleging that physical damage and injury to the cargo holds of the vessel occurred during the course of loading and discharging cargoes.

The vessel was chartered by Drys Shipping Corporation (hereinafter Owners) to A/S Falkefjell and A/S Dovrefjell (hereinafter Charterers) pursuant to the terms of a New York Produce Exchange Form of time charter for a period of five years, 45 days more or less in Charterers' option (42a*).

Clause 17 of the charter provides for the arbitration of any disputes in London¹ (43a). Disputes arose between the parties

* References to all matter included in the Joint Appendix will be designated by the page number followed by "a".

¹ Clause 17 provides as follows:

"That should any dispute arise between Owners and the Charterers, the matter in dispute shall be referred to three persons in *London*, one to be appointed by each of the parties hereto, and the third by the two so chosen; their decision or that of any two of them, shall be final, and for the purpose of enforcing any award, this agreement may be made a rule of the Court. The Arbitrators shall be commercial men." (Underlined portion indicates additions to the printed form)

and pursuant to the London arbitration clause of the charter, Owners and Charterers appointed London arbitrators and arbitration proceedings were commenced in London which proceedings are currently underway (62-63a).

After the parties appointed their arbitrators in London, further disputes arose between the parties concerning the maintenance of the vessel (63a) and a Memorandum of Agreement was signed by the parties dated July 2, 1976 (hereinafter July 2nd Agreement). The July 2nd Agreement provided that it was the irrevocable intention of the parties to proceed with all arbitrations (70a).

Despite the fact that the arbitration proceedings in London were in progress, Owners commenced legal proceedings against Charterers and attached and arrested sub-charter hire within the Southern District of New York in the amount of \$121,701.57 on or about January 6, 1977. After the District Court's denial of Charterers' motion to vacate the attachment and arrest, Owners attached sub-freights due to Charterers in an amount between \$200,000 and \$210,000 in Holland on or about February 28, 1977.

POINT I

TITLE 9, SECTION 8 DOES NOT PROVIDE A BASIS FOR THE USE OF ATTACHMENT TO SECURE THE POTENTIAL RESULTS OF AN ONGOING ARBITRATION IN A FOREIGN JURISDICTION.

9 U.S.C. § 8 provides as follows:

"If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceedings hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed

with the arbitration and shall retain jurisdiction to enter its decree upon the award."

The operative language of Section 8 is that a party claiming to be aggrieved may begin proceedings by libel and seizure. The attachment sought in the complaint is not sought in connection with an action to compel charterers to arbitrate within the meaning of 9 U.S.C. § 4, as authorized by 9 U.S.C. § 8. It is not disputed that the parties agreed to the arbitration of any disputes between them in London in both the charter party and July 2nd Agreement. Moreover, it is not disputed that arbitration proceedings are in progress in London. Therefore, Owners are not an aggrieved party by the failure, neglect or refusal of another to arbitrate. In view of the fact that Owners commenced arbitration proceedings against Charterers in London they cannot now argue that they began proceedings by libel and seizure within the provision of 9 U.S.C. § 8. The clear meaning of Section 8 cannot be ignored. Owners have not met the test for utilizing Section 8.²

POINT II

TITLE 9, CHAPTER 2, U.S.C. PROHIBITS PREARBITRATION ATTACHMENT.

A. The arbitration agreement in this case falls within the terms of The Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et seq.

The provisions for the enforcement of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards³

² As will be noted in Point III, the Supreme Court in *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974) held that an agreement to arbitrate disputes arising out of an international commercial transaction "is to be respected and enforced by the federal courts in accord with the explicit provision of the Arbitration Act, *Scherk* at 519-20.

³ In 1970, the United States ratified the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 9 U.S.C. § 201 et. seq., 3 U.S.T. 2517.

(hereinafter "Convention") is set forth in 9 U.S.C., § 201 which provides:

"§ 201. *Enforcement of Convention*

"The Convention on the Recognition and Enforcement of Foreign Arbitral Awards of June 10, 1958, shall be enforced in United States courts in accordance with this chapter. [Text of Convention omitted.]

The applicability of the "Convention" is determined by reference to 9 U.S.C. § 202 which provides:

"§ 202. *Agreements or award falling under the Convention*

"An arbitration agreement or arbitral award arising out of a legal relationship, whether contractual or not, which is considered as commercial, including a transaction, contract, or agreement described in section 2 of this title, falls under the Convention. An agreement or award arising out of such a relationship which is entirely between citizens of the United States shall be deemed not to fall under the Convention unless that relationship involves property located abroad, envisages performance or enforcement abroad, or has some other reasonable relation with one or more foreign states. For the purpose of this section a corporation is a citizen of the United States if it is incorporated or has its principal place of business in the United States."

Since there is no question that the charter party between Owners and Charterers is a maritime contract and contains an "arbitration agreement", the broad requirements of the first sentence of 9 U.S.C. § 202 have been met. Moreover, the charter party between Owners and Charterers falls squarely within the scope of 9 U.S.C. § 2 which covers "any maritime transaction" containing a "written provision . . . to settle by arbitration a controversy thereafter arising out of such . . . transaction".

The second sentence, with certain exceptions, excludes an agreement arising out of a relationship which is entirely between

citizens of the United States. Since the vessel is registered under the laws of Greece, the Owners are incorporated in Liberia, Charterers are incorporated in Norway, and none of the parties have a principle place of business in the United States, the exclusionary provision of the second sentence of 9 U.S.C. § 202 does not apply in the instant case. Accordingly, the arbitration agreement in this case falls within the terms of the Convention.

Since both the United States and the United Kingdom have ratified the Convention as a treaty, the District Court was bound by the terms of the Convention. *McCreary Tire & Rubber Company v. CEAT*, 501 F.2d 1032, 1036 (3rd Cir. 1974).

B. The convention precludes the District Court from entertaining a suit which violates an agreement to arbitrate, even for the purpose of granting provisional remedies such as pre-award attachment and garnishment.

In *McCreary Tire & Rubber Co. v. CEAT*, *supra*, the Third Circuit considered the validity of an attachment prior to an arbitration award in a commercial transaction governed by the Convention. The plaintiff in *McCreary* filed suit in state court for breach of a distributorship agreement and invoked the Pennsylvania foreign attachment procedures. CEAT, the defendant Italian corporation, removed the case to Federal District Court and moved, *inter alia*, to dissolve the foreign attachment, to dismiss the complaint, and to stay the action to permit arbitration in accordance with the terms of the distributorship contract. The District Court denied these motions. The Third Circuit reversed and remanded the case for entry of an order discharging the foreign attachment and referring the disputed claims to arbitration.

After finding that the Convention governed the arbitration agreement (*McCreary*, *supra*, pp. 1036-1037), the Third Circuit found that resort to the Pennsylvania pre-judgment attachment remedies was "a violation of McCreary's agreement to

submit the underlying disputes to arbitration". The Third Circuit noted:

"Quite possibly foreign attachment may be available for the enforcement of an arbitration award. This complaint does not seek to enforce an arbitration award by foreign attachment. It seeks to bypass the agreed upon method of settling disputes. Such a bypass is prohibited by the Convention if one party to the agreement objects. *Unlike § 3 of the federal Act, article II(3) of the Convention provides that the court of a contracting state shall 'refer the parties to arbitration' rather than 'stay the trial of the action.'* The Convention forbids the courts of a contracting state from entertaining a suit which violates an agreement to arbitrate. Thus the contention that arbitration is merely another method of trial, to which state provisional remedies should equally apply, is unavailable." 501 F.2d at 1038 (Italics added).

A lower court opinion which considered the application of the Convention and contains persuasive reasoning is *Metropolitan World Tanker Corp. v. P.N. Pertamina Minjakdangas Dumi National (P.M. Pertamina)*, 1976 A.M.C. 421 (S.D.N.Y. 1976). The District Court vacated an attachment obtained pursuant to the New York State attachment statute in connection with a dispute arising under a charter party which contained a London arbitration clause. The basis of the court's decision was that adherence by the United States to the Convention required dismissal of the case following the decision in *McCreary Tire & Rubber Company v. CEAT S.p.A.*, 501 F.2d 1032 (3rd Cir. 1974) and that the invocation of a state attachment remedy in aid of a 9 U.S.C. § 8 application was not a traditional admiralty procedure within the meaning of 9 U.S.C. § 8.

In *Metropolitan World Tanker Corp. v. Pertamina (P.M. Pertamina)*, *supra*, Judge Motley found that the arbitration agreement in question fell within the purview of the Convention

and therefore vacated the order of attachment and referred the parties to arbitration. Citing the Third Circuit's decision in *McCreary* with approval, Judge Motley stated:

"there is no . . . indication that . . . prearbitration attachment is warranted under the Convention. Indeed the very purpose behind the convention is to bring about the settlement of appropriate disputes solely through arbitration proceedings, and to allow a resort to attachment before such proceedings would seem to put an unnecessary and counterproductive pressure on a situation which could otherwise be settled expeditiously and knowledgeably in an arbitration context."
1976 A.M.C. at 423. (emphasis supplied)

In the District Court in this action the Owners argued that the *McCreary* case is inappropriate because it did not involve maritime attachment procedures. Although there may be a distinction between the maritime attachment and garnishment obtained in this case and the attachment in *McCreary*, it is a distinction without a difference. The disruptive impact of an attachment, whether maritime or according to state procedure, upon Charterers' business activities and the uncertainty in international commerce are the same.

In violation of their agreement to arbitrate "any disputes" in London and despite the fact that they initiated arbitration proceedings in London, Owners have disrupted Charterers' business in the United States and in Holland by commencing legal proceedings. The uncertainty and disruption continues because Charterers are still under the threat of continued legal proceedings at the whim of Owners.

Supplemental Rule B(1) of the Federal Rules of Civil Procedure provides that a verified complaint in admiralty may contain a prayer for process to attach the defendants' goods and chattels or credits and effects in the hands of garnishees, or in the alternative, the plaintiff may, pursuant to Rule 4(e), invoke the remedies provided by state law for attachment and garnish-

ment. In the context of international commercial transactions, is it not somewhat anomalous that the path which a plaintiff picks in order to obtain an attachment would be the determining factor as to the application of the Convention? To accept the argument that since there is a maritime attachment it is distinguishable from an attachment pursuant to state procedure would be to embrace parochialism, which approach the Supreme Court has rejected. *The Bremen v. Zapata Off-Shore Co.* 407 U.S. 1 (1972) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

POINT III

VACATION OF THE ATTACHMENT AND ARREST IS CONSISTENT WITH RECENT SUPREME COURT DECISIONS.

Two recent Supreme Court decisions⁴ have addressed the use of arbitration and forum selection clauses in international business contracts. One decision enforced a forum selection clause and the other enforced an arbitration clause.

In *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), the Supreme Court held that federal courts sitting in admiralty should consider forum selection clauses as *prima facie* valid and enforceable unless enforcement is shown by the resisting party to be unreasonable under the circumstances. 407 U.S. at 10 (1972). The case involved a dispute which arose when a drilling rig owned by a U.S. company, Zapata, was damaged in a storm in international waters off the Florida coast while being towed from Louisiana to the Adriatic Sea by Unterweser, a German corporation. The towage contract between Zapata and Unterweser provided that "any dispute arising [thereunder] must be treated before the London Court of Justice". The rig was towed to Tampa, the nearest port of refuge, upon instructions

⁴ *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) and *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974).

of Zapata. Zapata brought suit in admiralty in the United States District Court against Unterweser *in personam* and against Bremen *in rem* alleging negligent towage and breach of the towage contract. Unterweser invoked the forum clause and moved for dismissal. Unterweser's motion was denied. The Court of Appeals affirmed by panel decision and again on rehearing *en banc*. The Supreme Court reversed.

The Court in *Bremen* dismissed the traditional notion that forum selection clauses are contrary to public policy as attempts in advance of controversy to oust a court of jurisdiction, calling this notion "hardly more than a vestigial legal fiction". 407 U.S. at 12.

Chief Justice Burger stressed that an overly protective attitude of American courts would adversely affect the expansion of American international commerce. The Chief Justice rejected Zapata's claim that enforcement would be unreasonable because of the inconvenience of the London forum stating that enforcement of a forum selection clause would be "unreasonable" only where the resisting party would "be effectively deprived of a meaningful day in court". 407 U.S. at 19. Since Zapata could not meet its heavy burden of proving the unreasonableness of the provision, the action brought in the United States District Court in Tampa had to be dismissed.

In the course of his opinion, Chief Justice Burger conceded that "[a]bsent a contract forum" there were persuasive reasons for "holding an American forum convenient in the traditional sense." Thus, the Court in *The Bremen* relied exclusively on the forum selection clause in the towage contract in ordering that the suit in Tampa be dismissed. The instant case presents a far more appealing situation for enforcement of a forum selection provision than the facts presented in *The Bremen*, the District Court noting that the parties in this case have had no contacts with New York during the course of their transactions. (25a) Moreover, Owners could hardly assert that a London arbitration

is "unreasonable" since they voluntarily commenced arbitration proceedings there in March 1976.

The Bremen reasoning has been applied by a lower court in a clear and persuasive opinion in *The Sanko Steamship Co., Ltd. v. Newfoundland Refinery Company, Ltd., et al.*, 411 F.Supp. 285, 1976 A.M.C. (S.D.N.Y. 1976); aff'd without opinion 538 F.2d 313 (2nd Cir. 1976), petition for rehearing *en banc* denied June 3, 1976 (Docket 76-7060); cert. denied, 45 L.W. 3253. *Sanko* dealt with the vacation of an attachment obtained pursuant to the New York State attachment statute in connection with a dispute arising under a charter party which contained a London arbitration clause. The court dismissed the action and found no basis for the attachment which was obtained by means of Supplemental Rule B(1) and F.R.C.P. 64 pursuant to New York C.P.L.R. § 6201. The Court upheld the forum selection clause in the charter and found that the United States Court lacked jurisdiction to issue a writ of attachment because the parties were bound to arbitrate in London.

In that connection, it is helpful to note that the District Court, in *Sanko, supra*, determined that the forum selection/arbitration clause precluded the plaintiff from invoking the jurisdiction of the United States Court. The basis of the District Court's decision was *The Bremen, supra*, and the Court noted "That case laid at rest any doubt as to the enforceability of such claims and specifically held that they were applicable to *in rem* actions. *Sanko, supra*, at 286.

In *Scherk v. Alberto-Culver Co.*, 417 U.S. 506 (1974), the Supreme Court held that an agreement to arbitrate disputes arising out of an international commercial transaction "is to be respected and enforced by the federal courts in accord with explicit provision of the Arbitration Act." 417 U.S. at 519-20.

The Court pointed out that a "parochial refusal" to enforce international arbitration agreements could lead to "destructive jockeying" by the parties as each attempted to secure advantages

from courts of various countries. The problems of conflicting judgments from different nations' courts would create a "dicey atmosphere" which "would surely damage the fabric of international commerce and hide and imperil the willingness and ability of businessmen to enter international commercial agreements". 417 U.S. at 516, 517.

The Supreme Court stated:

"An agreement to arbitrate before a specified tribunal is, in effect, a specialized kind of forum-selection clause that posits not only the situs of suit but also the procedure to be used in resolving the dispute . . ." 417 U.S. at 519.

In footnote 13, the Court pointed out:

"Under some circumstances, the designation of arbitration in a certain place might also be viewed as implicitly selecting the law of that place to apply to that transaction . . ." 417 U.S. at 519.

In the instant case, the parties selected London as the place for the settlement of disputes and by so doing implicitly selected the English law.⁵ (43a) Any other interpretation would ignore

⁵ The printed form of charter used by the parties provides for New York arbitration in its unamended form. For the purpose of the charter, however, the provision for arbitration in New York was stricken and the words "in London" were inserted. Similarly, other modifications were made in the charter which further indicated the parties' intention to resolve any disagreements arising out of the charter party in London according to the rules, customs, and usages of arbitration prevailing in that forum. For example, the General Average Clause, Clause 19, provides as follows:

"That all derelicts and salvage shall be for Owners' and Charterers' equal benefit after deducting Owners' and Charterers' expenses and Crew's proportion. General average shall be adjusted, stated and settled, according to York Antwerp Rules 1950 in London and as to matters not provided by these Rules, according to the laws and usages at the port of London . . ." (Italics portions indicate additions to the printed form)

the long standing custom and practice of arbitration in London when a charter party contains a London arbitration clause.

In describing an agreement to arbitrate as "in effect, a specialized kind of forum-selection clause" the Court concluded by recognizing the need to reject parochialism while encouraging the certainty which constitutes an "indispensable element" in international commerce. 417 U.S. at 519.

It is interesting to note that in *Scherk*, Justice Stewart pointed out that the holding of the court was confirmed by the rationale of the Convention. He stated that the goal of the Convention was to "encourage the recognition and enforcement of commercial arbitration agreements in international contracts and to unify the standards by which agreements to arbitrate are observed." 417 U.S. at 520 n.15. The Court did not use the Convention as a basis for its opinion and did not reach the question whether the Convention would have served as an alternative basis for enforcing the arbitration.

The *Scherk* rationale has been applied by a lower court in vacating an attachment obtained pursuant to the New York State attachment statute in connection with a dispute arising under a charter party which contained a London arbitration clause.⁶

POINT IV

THE DISTRICT COURT ERRED IN STATING THAT OWNERS APPEAR TO HAVE A VALID LIEN.

The essence of Owners' claim in the Complaint is for physical damage and injury to the cargo holds of the M.S. Drys which occurred during the course of loading and discharging

⁶ See, *Incontrade, Inc. v. Oilborn International S.A.*, 407 F.Supp. 1359 (S.D.N.Y. 1976) where the court noted that when jurisdiction already exists, attachment should issue only upon a showing that drastic action is required for security purposes. In declining to exercise jurisdiction the Court recognized that especially in the area of international commerce, the ability of the parties to agree in advance to a forum in which they may resolve their disputes is essential.

cargoes. (2-3a) Owners have characterized this as a claim for "loss of hire and damages" (3a) and seek to enforce their claim pursuant to the lien clause of the charter (Clause 18) which provides as follows:

"That the Owners shall have a lien upon all cargoes, and all sub-freights for any amounts due under this Charter, including General Average contributors, and the Charterers to have a lien on the Ship for all monies paid in advance and not earned, and any overpaid hire or excess deposit to be returned at once . . ."

With reference to the lien clause, the District Court stated:

"Such language has been held to include claims for damage and to extend to all monies due a charterer under a sub-charter. *Freights of the Kate*, 63 F. 707 (S.D.N.Y. 1894). At least as to the hire not paid by the charterers to the owner during the period of asserted extraordinary repairs, the lien would appear to be valid. Since the amount of monies attached (under one hundred thousand dollars) is less than a third of the lost hire and barely an eighth of the total sum claimed by the plaintiff, the attachment is neither excessive nor improper."

The District Court was in error and misunderstood a fundamental provision of the charter. Pursuant to the charter party, Charterers are obliged to pay hire for the use of the vessel at a stated rate monthly in advance (42a). Under certain circumstances the Charterers' obligation to pay hire as per the charter party is suspended. For example, Clause 15 of the charter provides (43a) in part:

"That in the event of the loss of time from deficiency and/or default of men or stores, fire, breakdown or damages to hull, machinery or equipment . . . drydocking for the purpose of examination or painting bottom or by any other cause pre-

venting the full working of the vessel, the payment of hire shall cease for the time thereby lost; . . ."

In the charter in question there is a "drydocking" clause (Clause 21) (43a) which specifically suspended Charterers' obligation to pay hire. It provides in part as follows:

" . . . Vessel is to be docked at a convenient place, bottom cleaned and painted whenever Charterers and Captain think necessary, at least once in every *twelve* months, reckoning from time of last painting *providing convenient and time and place to be mutually agreed between Owners and Charterers*, and payment of hire to be suspended until she is again in proper state for service." *Off-hire time shall be counted from the time the vessel deviates from a natural course as ordered by Charterers until she is back in the same or similar position ready to resume service.*

(Italic portions indicate additions to the printed form)

The clause specifically provides that the vessel is "off-hire" until she is back in a similar position ready to resume service. Moreover, Clause 54 of the charter permits deductions from the payment of charter hire for off hire incurred or estimated⁷.

Accordingly, in view of the fact that the Charterers did not have use of the vessel during the repair period, the vessel was off hire pursuant to both Clause 15 and 21, and no obligation

⁷ Clause 54 of the rider to the charter provides as follows:

"Charterers may deduct from the payment of charter hire any amount disbursed for Owners' account and supported by vouchers. Charterers shall be allowed to deduct from charter hire instalments amounts disbursed or to be disbursed for Owners' account as well as off-hire incurred or estimated. From the last hire payment Charterers may deduct the estimated amount of expenses disbursed or to be disbursed by them for Owners' account, including the estimated cost of bunkers remaining on-board on redelivery and for which vouchers have not reached the Charterers for submission to the Owners."

accrued to pay hire. Furthermore, Clause 54 of the charter permits Charterers to make deductions from payment of charter hire for periods of off hire. Therefore, it is unquestionably clear that no payments of hire were due under the charter while the vessel was not in Charterers' service and there is no basis whatsoever for Owners to claim that they have a lien pursuant to Clause 18 of the charter.

A lien on subfreights is a contractual lien and must be created by an express provision in the charter party or other agreement. "It is settled law that where cargo shipped under a charter is owned by a third party, general maritime law apparently does not give the shipowner a lien against either the cargo or the freight money." *Gilmore & Black, The Law of Admiralty*, p. 631 n.103 (2nd Ed. 1975)

The July 2nd Agreement entered into between the parties does not give Owners a lien. The parties incorporated the arbitration clause of the charter party into the July 2nd Agreement (70a). They did not incorporate the July 2nd Agreement into the charter. Therefore, even assuming that the plaintiff's claims are the type which would give rise to a maritime lien, such a contract lien was not given to Owners under the terms of the July 2nd Agreement.⁸

This court has recognized that to secure the payment of sums due under a charter of his ship, a shipowner may create by express provision in the charterparty a lien on the subfreights earned by his vessel. *Marine Traders, Inc. v. Seasons Navigation Corporation*, 422 F.2d 804 (1970). The lien has been enforced

⁸ Yet, Owners claim for stevedore damages is not ripe. According to the charter party, Charterers are obligated to redeliver the vessel "in like good order and condition, ordinary wear and tear excepted" (42a). Therefore, Charterers' obligation to repair any stevedore damage for which they are responsible does not arise until the time of redelivery of the vessel to Owners. Any claim prior to the time of redelivery is premature and certainly not an "amount due under the charter".

where Owners presented claims for unpaid hire and certain other items which are unquestionably for Charterers' account. Owners are not entitled to a lien for unliquidated claims for physical damage to the vessel,⁹ since there are no amounts due under the charter. Owners' claims for physical injury and damage are claims for general damages for breach of the charter party, the quantum of which can only be determined by the London arbitrators and are not for amounts due under the charter within the meaning of the lien clause.

Under English law, the law to which the parties agreed, the lien clause in question has been interpreted to encompass only known amounts clearly chargeable to Charterers' account. An authoritative treatise on British Shipping Laws states:

"A lien for any amount due under the charterparty will cover charges for bunker coals and other disbursements, which by the charterparty ought to have been paid by the charterers, but were in fact paid by the shipowners owing to the insolvency of the charterers; but not damages recoverable by the

⁹ As a prerequisite for Charterers' responsibility for stevedore damage to the vessel's cargo holds, Owners are obliged to fulfill their obligation pursuant to Clause 30 of the charter which provides as follows:

"The Charterers shall not be responsible for any damage to the vessel's hull, machinery and equipment caused by the Charterers or their agents, servants, employees or by any independent contractor, including stevedores, unless the master has complied with the following stipulations:

1. At the time of the occurrence informed the supercargo and the Charterers' agents in writing of the damage sustained,
2. in writing held the party caused the damage liable for the damage, and requested a written acknowledgement of liability,
3. Master to cooperate with Charterers' agents or supercargo in establishing liability and cost of repairing damage,
4. informed the Charterers by carbon copies of his letters under subject 1 and 2 above.

shipowners in respect of breaches by the charterers of the charterparty."¹⁰ 2 *Carver, Carriage by Sea*, § 1344 (12th Ed. 1971).

CONCLUSION

For the foregoing reasons, and on the authority of *The Bremen* and *Scherk, supra*, the order of the court below denying Charterers' motion to vacate the Process of Maritime Attachment and Garnishment and Warrant for Arrest *In Rem*, denying Charterers' motion to dismiss the Complaint and denying Charterers' request for an order restraining Owners from further attempting to exercise liens pursuant to the charter for claims subject to London arbitration should be reversed.

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Respectfully submitted,

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¹⁰ Citing *Samuel v. West Hartlepool S.N. Co.* (1906) 11 Com.Cas. 115; 12 Com.Cas. 203.